SUPREME COURT, U. S.

FILED

APR 13 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-707

ARTHUR SANDERS, JR.,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF GEORGIA

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The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Georgia entered in the above case on June 2, 1975.

OPINION BELOW

The Opinion of the Supreme Court of Georgia is reported at 234 Ga. 586, 216 S.E.2d 838, and is set forth in Appendix A hereto.

JURISDICTION

The Judgment of the Supreme Court of Georgia was entered on June 2, 1975. An application for rehearing was timely filed and denied on June 17, 1975. On August 29, 1975, Mr. Justice Powell granted an extension of time to and including November 14, 1975, within which to file this Petition. This Court's jurisdiction is invoked under *Title 28 United States Code* § *1257(3).*

QUESTIONS PRESENTED

1. Whether a jury comprised of five persons is sufficient to afford to an accused in a criminal prosecution the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

2. Whether the motion picture film "Deep Throat" can, as a matter of law, be held obscene or whether it constitutes speech protected by the First and Fourth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Sixth, and Fourteenth Amendments to the United States Constitution, as

well as Article VI, Section XVI of the Georgia Constitution (*Georgia Code Annotated* § *2-5101*) and an Act Establishing the Criminal Courts of Atlanta (Georgia Laws 1890-1891, Volume 2, p. 935, as amended by Georgia Laws 1935, Volume 2, p. 498) are set forth in Appendix B Hereto.

STATEMENT

The Petitioner herein was charged in the Criminal Court of Fulton County with two counts of violating the State obscenity statute, *Georgia Code Annotated* § *26-2101*. The charges were based upon two exhibitions of a single motion picture film entitled "Deep Throat." The charges were based upon exhibition of this allegedly obscene film at the Gay Paree Theatre in Atlanta, Georgia, on August 31, 1973, and on September 5, 1973.

The case came to trial on May 13, 1974. Pursuant to the provisions of the Georgia Constitution and statutes here challenged, Petitioner was tried by a jury comprised of five persons. That jury found the Petitioner guilty on both counts of the accusation. Petitioner was subsequently sentenced to a term of imprisonment for two years (two 12-month sentences to be served consecutively) and to fines in the amount of $2,000.00. The judgment of conviction was affirmed in the Georgia Court of Appeals and in the Georgia Supreme Court in an opinion and judgment for which review is sought in this Petition.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS FOR REVIEW AN ISSUE EXPRESSLY RESERVED BY THIS COURT IN *WILLIAMS V. FLORIDA*, 399 U.S. 78 (1970) – THE MINIMUM NUMBER OF JURORS REQUIRED TO GUARANTEE THE CONSTITUTIONAL RIGHT TO JURY TRIAL IN CRIMINAL CASES.

The as yet undecided status of the issue here presented for review – the minimum number of jurors necessary to guarantee the constitutional right to a trial by jury in criminal matter – was explicitly recognized in *Williams v. Florida*, 399 U.S. 78 (1970). The *Williams* case presented two issues of major import, one of them dealing with the Sixth Amendment right to jury trials as applied to the States through the Fourteenth Amendment.

Williams was convicted of robbery in a Florida State Court, his judgment of conviction being predicated upon a verdict of guilty returned by a six-person jury. Prior to his trial, Williams had sought to empanel a twelve-person jury, challenging the Florida State statute which provides for six person juries in all but capital cases. His motion was denied and the issue of the constitutionality of juries comprised of less than twelve persons was therefore presented in this Court.

The Court first of all noted that the Sixth Amendment right to trial by jury in criminal cases had been made applicable to the States through the Fourteenth Amendment in *Duncan v. Louisiana*, 391 U.S. 145 (1968). It was noted that, pursuant

to *Duncan*, the Fourteenth Amendment guarantees an accused in state criminal trials the right to a jury in all cases which would invoke such a right if tried in federal court. Williams' robbery trial clearly fell within the scope of the *Duncan* holding. See *Baldwin v. New York*, 399 U.S. 66 (1970) and *De Stefano v. Woods*, 392 U.S. 631 (1968).

Having noted that the Sixth Amendment right to jury trial in criminal matters was thus applicable, this Court went on to decide whether that concept of "trial by jury" necessarily required a state jury of twelve persons:

> "The question in this case then is whether the constitutional guarantee of a trial by 'jury' necessarily requires trial by exactly 12 persons, rather than some lesser number – in this case, 6." 399 U.S., at 86.

The Court rejected the Petitioner's contention and held that, in order to adequately guarantee the constitutional right to jury trial in criminal matters, States need not provide for juries of exactly twelve persons:

> "We hold that the 12-man panel is not a necessary ingredient of 'trial by jury,' and that respondent's refusal to empanel more than 6 members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth." *Id.*

In thus deciding that a twelve-person jury is not constitutionally mandated, however, this Court did not determine what minimum number would be required to guarantee this Sixth Amendment right. Indeed, that question was expressly reserved:

> "We have no occasion in this case to determine what minimum member can still constitute a 'jury,' but we do not doubt that 6 is above that minimum." 399 U.S., at 91 n.28.

The fact that the question was left unresolved in *Williams* was expressly noted by the Georgia Supreme Court in rejecting Petitioner's argument in this case. The failure of this Court to determine what minimum number can still constitute a "jury" was cited below as, *inter alia*, the justification for rejection of Petitioner's argument at the State level:

> "The Supreme Court of the United States has not determined what minimum number of jurors can still constitute a 'jury.' In Williams v. Florida, 399 U.S. 78, 92, 90 S. Ct. 1893, 1901, 26 L.Ed.2d 446 (Fn. 28) it is observed 'We have no occasion in this case to determine what minimum number can still constitute a "jury," but we do not doubt that six is above that minimum.' Absent a holding by the United States Supreme Court that a five-man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts." 234 Ga. 586, 216 S.E.2d 838.

The instant Petition squarely presents the issue for final resolution by this Court. Whatever the outcome, it is respectfully submitted that the open-ended uncertainty precipitated by the *Williams* footnote should be eliminated. As was noted by Mr. Justice Harlan in *Williams, supra:*

> "The court's elaboration of what is required provides no standard and vexes the meaning of the right to a jury trial in federal courts, as well as state courts, by uncertainty . . . . The uncertainty that will henceforth plague the meaning of trial by jury is itself a

> further sufficient reason for not hoisting the anchor to history." 399 U.S., at 126.

It is also necessary to delineate the minimum number required to safeguard the Sixth Amendment guarantee of trial by jury in order to eliminate the "slippery slope" recognized by the Court in *Williams, supra:*

> "The *Thompson* opinion also reasoned that if a jury can be reduced from 12 to eight, then there was nothing to prevent its similarly being reduced to four or two or even zero, thus dispensing with the jury altogether. See 170 US at 353, 42 L Ed at 1067. That bit of logic, resurrected today in Mr. Justice Harlan's concurring opinion, post, at 126, 26 L Ed 2d at 468, suffers somewhat as soon as one recognizes that he can get off the slippery slope before he reaches the bottom." 399 U.S., at 91 n.28.

When viewed in light of the purposes of the jury trial right, it cannot be doubted that the jury of five provided for the Petitioner in this case was insufficient. It has been recognized that among the purposes of a jury trial in criminal matters is that of interposing members of the community between corrupt or overzealous prosecutors and compliant judges:

> "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." 391 U.S., at 156.

This purpose was expounded upon by this Court in *Williams* which noted that the jury also serves the purpose of providing the common sense judgment of the community:

> "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." 399 U.S., at 99.

The Court in *Williams*, although failing to reach the issue of the required minimum, did enunciate the principles to be applied in that determination:

> "[T]he number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." *Id.*

When judged against these criteria, the five-person jury provided by the Georgia statute here under review must be found wanting. Statistical studies subsequent to the *Williams* decision have adequately established that smaller juries are significantly less representative of minority positions. *See, e.g.*, Zeisel, *The Waning of the American Jury*, 58 A.B.A. Journal 367; Diamond, *A Jury Experiment Reanalyzed*, 7 Mich. Journal of Law Reform 520; Zeisel and Diamond, *Convincing Empirical Evidence*, 41 University of Chicago Law Review 281.

If the purpose of a jury is to interpose the conscious of the community between the prosecutor and a compliant judge, a broad cross-section must be afforded in order to assure that the compliant judge is not merely replaced by a single compliant juror with the ability to determine guilt or innocence. Group deliberation and group dynamics necessitate at least the six person minimum found constitutionally acceptable in *Williams*.

II.

THE MOTION PICTURE FILM "DEEP THROAT" UPON WHICH PETITIONER'S CONVICTION RESTS IS AN ARTISTIC WORK OF NATIONAL ACCLAIM WHICH MAY NOT, AS A MATTER OF APPLICABLE CONSTITUTIONAL LAW, BE HELD OBSCENE SINCE IT CONSTITUTES EXPRESSION PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court is respectfully requested to independently review the alleged obscenity of the motion picture film upon which Petitioner's conviction is predicated. The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). That case involved action by a local postmaster in withholding delivery of certain magazines after finding them obscene. The publishers who had mailed the magazines brought suit in the United States District Court seeking injunctive relief, but their complaint was dismissed without opinion. The Court of Appeals affirmed the dismissal, holding that the evidence supported the administrative findings that the magazines were obscene and thus non-mailable matter. This Court reversed in a judgment announced by Mr. Justice Harlan.

The Court thought the dispositive question to be whether or not the magazines were in fact obscene. 370 U.S., at 488. On this issue, the Court noted that the determination below had been made under improper assumptions as to the law of

obscenity. The Court, however, decided against remanding the case for an initial determination of the obscenity issue below:

> "Whether this question [of obscenity] be deemed one of fact or of mixed fact and law, see Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5, 114-115 (1960), we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations." 370 U.S., at 488.

The Court decided that the determination of that issue must ultimately rest with it:

> "That issue, involving factual matters entangled in a constitutional claim, see Grove Press, Inc. v. Christenberry (CA 2 NY) 276 F2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves." *Id.*

The doctrine of independent review was again invoked by this Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *Jacobellis* involved a conviction of a Cleveland, Ohio motion picture theatre operator for possessing and exhibiting the film "The Lovers." On appeal, this Court reversed in a judgment announced by Mr. Justice Brennan. On the issue of independent review, Mr. Justice Brennan, relying in part upon *Manual Enterprises, Inc. v. Day, supra*, states:

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See Roth v. United States, supra, 354 US, at 497-498, 1 L ed 2d at 1541, 1515 (separate opinion). Such an issue, we think, must

> ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' Id., at 498, 1 L ed 2d at 1514; see Manual Enterprises, Inc. v. Day, 370 US 478, 488, 8 L ed 2d 639, 647, 82 S Ct 1432 (opinion of Harlan, J.)." 378 U.S., at 188.

It was noted that the duty of appellate review is not a pleasant one, but it was held to be one which must be exercised:

> "We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence." The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." 378 U.S., at 187-188.

Mr. Justice Brennan, in an opinion joined by Mr. Justice Goldberg, went on to conclude that reversal was necessary since the film "The Lovers" was not obscene. This conclusion as to the film was concurred in by Mr. Justice Stewart.

The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was affirmed by this Court only recently in the case of *Jenkins v. Georgia*, 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute

founded upon the exhibition of the film "Carnal Knowledge." This Court reversed the conviction based upon its own viewing of the film, and the finidng that the film could not, as a matter of constitutional law, be held obscene.

The Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the obscenity *vel non* of the nationally acclaimed motion picture film "Deep Throat" upon whick Petitioner's conviction rests.

It should be noted that the failure of certain lower courts to perform the duty of independent review enunciated in *Manual Enterprises, Jacobellis* and *Jenkins* has once again placed the issue before this Court. In *United States v. Marks,* 520 F.2d 913 (CA 6 1975), the Court of Appeals for the Sixth Circuit affirmed an obscenity conviction involving, *inter alia,* the motion picture film "Deep Throat," for which review is sought here. In thus affirming, however, the Court failed to review the materials which formed the basis for the conviction. 520 F.2d, at 923 n.1. This is in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Clicque v. United States,* 514 F.2d 923 (CA 5 1975). In *Clicque,* the Fifth Circuit reaffirmed and followed the mandate of independent appellate review, holding it applicable even in cases involving guilty pleas.

The issue of independent appellate review and the conflict in the Circuits which it has generated will be presented to this Court in a Petition for Writ of Certiorari to review the judgment and opinion of the Sixth Circuit Court of Appeals in *United States v. Marks, supra.* Mr. Justice Stewart has granted an extension of time within which to file such a Petition to and including November 14, 1975. *Stanley Mark, et al. v. United States,* No. A-307. This Court may thus wish to defer

determination of the instant Petition pending resolution of the Petition in *Marks, supra.*

In any independent review, the past findings of this Court on the sole issue of obscenity have obvious bearing. In this respect it is important to note that findings of obscenity have been reversed by this Court as to press materials devoted entirely to explicit depictions or descriptions of sexual activities, including detailed and vernacular descriptions reaching the ultimate in explicitness as to heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sado-masochism, and homosexual activity. *See, e.g., Memoirs v. Massachusetts,* 383 U.S. 413 (1966) ("Fanny Hill"); *Aday v. United States,* 388 U.S. 447 (1967) ("Sex Life of a Cop" described at 357 F.2d 855); *Corinth Publications v. Westberry,* 388 U.S. 448 (1967) ("Sin Whisper" described at 146 S.E.2d 764); *Mazes v. Ohio,* 388 U.S. 453 (1967) ("Orgy Club"): *Hoyt v. Minnesota,* 399 U.S. 524 (1970) ("The Way of a Man with a Maid," "Lady Susan's Cruise Lover," and three other books); *Grove Press v. Gerstein,* 378 U.S. 577 (1964) ("Tropic of Cancer").

In the area of motion picture films, this Court has reversed findings of obscenity as to films which depict totally nude women; films which depict nude and partially nude men and women engaged in sexual gyrations, simulated intercourse, and simulated oral-genital contact, all emphasizing pubic and rectal areas; and films depicting lesbian sexual activity and hetero-sexual activity between men and women. Moreover, this Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity as to a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess,* 429 F.2d 416 (CA 9 1970), *affirmed sub nom. Pinkus v. California,* 400 U.S. 922 (1970).

When the nationally acclaimed motion picture film "Deep Throat" is considered as a whole and judged against press materials of a similar or more explicit nature heretofore determined by this Court not to be obscene, the conclusion is inescapable that the film constitutes protected speech under the First and Fourteenth Amendments to the Constitution of the United States. It should be so held and Petitioner's conviction should thus be reversed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Georgia.

Respectfully submitted,

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APPENDIX A

Arthur SANDERS, Jr.

v.

The STATE.

No. 29842.

Supreme Court of Georgia.

June 2, 1975.

Rehearing Denied June 17, 1975.

INGRAM, Justice.

[1] The film, "Deep Throat," is here for review of the trial court's judgment that it is obscene. This court has viewed the film and considered the enumerations of error. In our judgment, the film is obscene as a matter of law and fact.

[2] Appellant's motion for a trial by a jury of not less than twelve jurors was properly denied by the trial court. Only five jurors are required by statute for the trial of misdemeanor cases in the Criminal Court of Fulton County. See Ga.L. 1890–91, Vol. 2, p. 935, as amended by Ga.L. 1935, p. 498. The present Constitution authorizes the General Assembly to prescribe any number, not less than five, to constitute a trial jury except in the superior court where twelve jurors are mandatory. See Code Ann. § 2-5101, Const. art. VI, § XVI, par. 1.

[3] Appellant also argues that a jury of five persons is "constitutionally inadequate" because it denies him equal protection of the law. We reject this argument in view of Georgia authority to the contrary. See, *McIntyre v. State,* 190 Ga. 872(5), 11 S.E.2d 5. The Supreme Court of the United

States has not determined what minimum number of jurors can still constitute a "jury." In Williams v. Florida, 399 U.S. 78, 92, 90 S.Ct. 1893, 1901, 26 L.Ed.2d 446 (Fn.28) it is observed "We have no occasion in this case to determine what minimum number can still constitute a 'jury,' but we do not doubt that six is above that minimum." Absent a holding by the United States Supreme Court that a five-man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts.

We find no error for any reason enumerated and argued in this appeal and affirm the trial court. See *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (cert. denied by U.S. Supreme Court April 28, 1975).

Judgment affirmed.

All the Justices concur, except GUNTER, J., who concurs in the judgment only.

APPENDIX B

Constitutional and Statutory Provisions

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. The pertinent provisions of the Sixth Amendment are:

   "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

3. The pertinent provisions of the Fourteenth Amendment are:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Article VI, Section XVI of the Georgia Constitution (*Georgia Code Annotated* § *2-5101*) provides:

   "The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the superior court."

5. An Act Establishing the Criminal Courts of Atlanta (Georgia Laws 1890-1891, Volume 2, p. 935, as amended by Georgia Laws 1935, Volume 2, p. 498) provides in pertinent part:

"[T]he jury in [Fulton] County shall consist of five, to be stricken alternately by the defendant and State from a panel of twelve. The defendant shall be entitled to four strikes and the State three and the five remaining jurors shall compose the jury."

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PART ONE

The State of Georgia, Respondent, by and through Hinson McAuliffe, Solicitor General, Criminal Court of Fulton County, prays that the Application for Writ of Certiorari to the Supreme Court of Georgia to review the judgment entered in this case on June 2, 1975, be denied.

OPINION BELOW

The decision sought to be reviewed by this Court is reported at 234 Ga. 586, 216 S.E.2d 838 (1975). It is also set out as "Exhibit A" in Petitioner's Petition for Writ of Certiorari, Appendix.

JURISDICTION

Respondents adopt Petitioner's jurisdictional statement.

QUESTIONS PRESENTED

1. Whether a jury of five persons is constitutionally adequate under the Sixth and Fourteenth Amendments of the Constitution of the United States.

2. Whether the motion picture film "Deep Throat" is obscene as a matter of law and is therefore not protected expression under the First and Fourteenth Amendments of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents adopt the Constitutional and statutory provisions set forth in Appendix "B" of the Petition for Certiorari.

STATEMENT OF FACTS

On or about August 31, 1973, Petitioner began exhibiting a motion picture film entitled "Deep Throat" at the Gay Paree Cinema. Ten dollars per person was charged as an admission fee. The film portrayed acts of sexual intercourse between male and female humans, lewd exposure of the sexual organs of male and female humans, and male and female humans caressing and indecently fondling the sexual organs of other persons. The predominant theme of the film emphasized acts of fellatio; repeated in scene after scene. Also explicitly shown are actual acts of masturbation, coitus, cunnilingus and anal intercourse. On the same day the

Appellant began to exhibit the film, a search warrant issued, Petitioner was arrested for distributing obscene materials and one copy of the film was seized. After a preliminary hearing Petitioner continued to show the film and another arrest took place on September 5, 1973. Petitioner continued to exhibit the film and on September 6, 1973, the District Attorney brought a civil action to enjoin the exhibition of the film. A permanent injunction was granted on September 10, 1973, after a jury trial in the Superior Court.

The Solicitor General of the Criminal Court of Fulton County, Georgia, filed a two count accusation alleging that the dates of the offenses were essential averments and the case came to trial on May 13, 1974. Under authority of the act establishing the Criminal Courts of Fulton County—Georgia Laws 1890-1891, p. 935—as amended, Petitioner was tried by a five person jury. The jury found Petitioner guilty on both counts and the court sentenced him to two twelve month sentences to be served consecutively and a two thousand dollar fine. A motion for new trial was denied on November 12, 1974, and appeal was taken to the Georgia Court of Appeals. However, upon State's motion the appeal was transferred to the Supreme Court of Georgia. The case below was affirmed on June 2, 1975.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

A. THE INSTANT CASE DOES NOT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT, NOR DECIDE SUBSTANTIAL FEDERAL QUESTIONS OF NATIONWIDE IMPORT.

1. A JURY OF FIVE PERSONS IS CONSTITU-

TIONALLY ADEQUATE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

Petitioner was tried by a jury of five persons. Under the statute creating the Criminal Court of Fulton County, juries are composed of five persons stricken from a panel of twelve and the defendant is entitled to four preemptory strikes and the State three. The Defendant gets first and last preemptory strikes. Ga. Laws 1890-1891, p. 935, as amended. The court was created in 1891 and why the number of jurors was fixed at five is not known. The Criminal Court of Fulton County is a court of limited jurisdiction and may only try misdemeanors, Ga. Laws 1890-1891, p. 935, as amended. It is the only Georgia court of misdemeanor jurisdiction with a five man jury. Jury verdicts in the Criminal Court of Fulton County must be unanimous as they must be in all Georgia Courts. Ball v. Ga., 9 Ga. App. 162, 20 S.E. 888 (1911).

The five man jury has been upheld in Georgia. McIntyre v. Ga., 190 Ga. 872, 11 S.E. 624 (1940), Willis v. Ga., 122 Ga. App. 776 (1970).

The five man jury comports with this Court's decision in Williams v. Florida, 399 U.S. 78 (1970). In that case, this Court held a six man jury was constitutionally adequate in State trials under the Sixth and Fourteenth Amendments. This Court said:

> "The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge'. Duncan v. Louisiana, supra, 391

> U.S., at 156, 88 S.Ct., at 1451. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained.* And, certainly the reliability of the jury as a factfinder hardly seems likely to be a function of its size.
>
> It might be suggested that the 12-man jury gives a defendant a greater advantage since he has more "chances" of finding a juror who will insist on acquittal and thus prevent conviction. But the advantage might just as easily belong to the State, which also needs only one juror out of twelve insisting on guilt to prevent acquittal." (Emphasis supplied) Williams v. Florida, 399 U.S. 78, 103, 104, (1970).

In the instant case, the defendant was entitled to a unanimous verdict and an extra preemptory strike.

It is clear from the *Williams* case that mere size is not the controlling factor in the Sixth Amendment right to a jury trial. One important factor is the insulation provided by a lay body standing between the government and the defendant. *See* Baldwin v. New

York, 399 U.S. 66 (1970); Torres v. Delgado, 391 F. Supp. 379 (D.C.P.R. 1974), affirmed 510 F.2d 1182 (1st Cir. 1975).

The Petitioner has not complained that an arbitrary exclusion of a particular class has taken place. Williams v. Florida, 399 U.S. 78 (1970).

Petitioner argues that a lesser number than 12 or six denies a cross-section—however, this Court said in *Williams:*

> ". . . the concern that the cross-section will be diminished if the jury is decreased in size from 12 to six seems an unrealistic one." Williams v. Florida, 399 U.S. 104 (1970).
>
> As one commentator has said (speaking of civil cases),
>
> "Because the members of the five man jury represent a cross-section unit of the community, they will continue to bring into the courtroom the diversity of viewpoint, the objectivity of detachment, the non-professional sense of values, and the spirit of justice and fairness unhampered by precedent, which are the foundations of the jury system as we respect it. Moreover, all of the historic values placed upon the jury as a "casual tribunal" attach readily to the five-member jury as it actually functions in the jury box; human virtues—and shortcomings—are fully present whether there are twelve or five jurors." THE FIVE-MAN CIVIL JURY 51 Geo. L.R. 120, 137 (1962).

This court has not decided what the minimal number of jurors may be under the Sixth Amendment, however, in *Williams* this Court hinted in a footnote that six is above the minimum:

> "We have no occasion in this case (*Williams*) to determine what minimum number can still constitute "a jury", *but we do not doubt that six is above that minimum*" (emphasis supplied) Williams v. Florida, 399 U.S. 78, 92 N. 28.

In Johnson v. Louisiana, 406 U.S. 356 (1971) this court went further and considered the jury system of Louisiana.

> "Louisiana has permitted less serious crimes to be tried by five jurors with unanimous verdicts, more serious crimes have required the assent of nine of 12 jurors, and for the most serious crimes a unanimous verdict of 12 jurors is stipulated. In appellant's case, nine jurors rather than five or 12 were required for a verdict. We discern nothing invidious in this classification. We have held that the States are free under the Federal Constitution to try defendants with juries of less than 12 men. Williams v. Florida, 399 U.S. 78 (1970).
>
> . . . As to the crimes triable by a five-man jury, if appellant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana Legislature. That body obviously intended to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment. We remain unconvinced by anything appellant has presented that this legislative judgment was defective in any constitutional sense." Johnson v. Louisiana, 406 U.S. 356, 364, 365 (1971).

It is clear that Sixth Amendment requires a jury trial in any case other than a "petty offense", Baldwin v. New York, 399 U.S. 66 (1970), but it is also clear that the number of jurors is constitutionally irrelevant as long as it is enough to carry out the juries historical function and five jurors is adequate for that purpose.

Williams v. Florida, 399 U.S. 78 (1970); Johnson v. Louisiana, 406 U.S. 356 (1971).

2. THE MOTION PICTURE FILM "DEEP THROAT" IS OBSCENE AS A MATTER OF LAW AND IS THEREFORE NOT PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The motion picture film "Deep Throat" has national acclaim—as one of the most obscene films ever made. As one court described it,

> "In the instant case, the trial judge as trier of the facts viewed the film "Deep Throat" and found that it was obscene under the *Miller* test. The court found that it was hard-core pornography and "was nothing more or less than a so-called 'stag film'. . . ." On the basis of our viewing the film, it is clear that this is an accurate categorization.
>
> The film "Deep Throat" is for the most part a series of explicit depictions of sexual acts, including cunnilingus, fellatio, masturbation, normal and anal intercourse, and group sex. Effort was obviously made by the film makers to concentrate on the actors' genitals during the scenes of sexual activity. Well over half of the length of the film was devoted to displaying the explicit sexual acts. The satirical scenes referred to by some of Petitioner's witnesses were brief and sophomoric, serving as little more than introductions to the scenes of explicit sexual activity.
>
> "This case is the first case in which the question of hard-core pornography has been considered by this Court since the *Miller* definition was formulated by the Supreme Court. The film is clearly within the *Miller* definition of obscenity or hard-core pornography. In fact, "Deep Throat" would

> probably be deemed obscene under any meaningful definition of that term, including that set forth by the plurality opinion in *Memoirs*."

Mangum v. Maryland Board of Censors, 273 Md. 176; 328 A.2d 283 (1974).

Other jurisdictions have held the film to be obscene. U. S. v. One Reel of Film, 481 F.2d 206 (1st Cir. 1973); Coleman v. Wilson, 123 N.J. Super. 310, 302 A.2d 555 (1973); People v. Mature Enterprises, Inc., 73 Misc. 2d 749, 343 N.Y.S. 2d 911 (1973).

In the State of Georgia, this same film was held obscene by a jury in the civil action which grew out of this case. S. S. W. Corporation v. Slaton, 231 Ga. 734, 204 S.E.2d 155 (1974) and by a separate criminal jury in the instant case.

The film was before this court in another case decided on other grounds. Hicks v. Miranda, 422 U.S. 332 (1975).

The film is hard-core pornography at its very worst and is obscene in every sense of the word.

Prior decision of this Court after *Roth* but before *Miller* are of no help to the petitioner so far as the materials involved. Many were so called *Redrup* reversals, Redrup v. N. Y., 386 U.S. 767 (1967), and others were plurality decisions and have value as precedent.

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power.
>
> In the absence of a majority view, this Court was compelled to embark on the practice of summarily

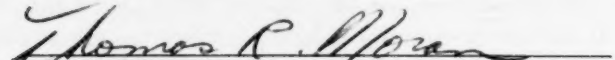
reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed. 2d 515 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* "policy". Miller v. California, 93 S.Ct. 2607, 2614 N. 3 (1973).

Now that "separate tests" no longer exist, these *Redrup* cases are useless as precedent.

CONCLUSION

Wherefore, the respondent prays that the Petitioner's Writ of Certiorari to the Supreme Court of Georgia be denied.

Respectfully submitted,



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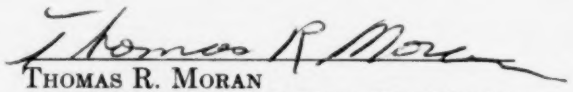
CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three (3) copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari with first class postage prepaid addressed to Robert Eugene Smith, Esquire and Gilbert H. Dietch, Esquire, 2005-100 Colony Square, Atlanta, Georgia 30361, counsel of record for Petitioner, and Glen Zell, Esquire, 15 Peachtree Street, N. E., Atlanta, Georgia 30303, of counsel for Petitioner.



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IN THE

Supreme Court of the United States

October Term, 1975

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Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF GEORGIA

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner respectfully moves this Court for an Order vacating its denial of the Petition for Writ of Certiorari entered on February 23, 1976, and granting said Petition.

STATEMENT OF THE CASE

The Petitioner herein was charged in the Criminal Court of Fulton County, Georgia with violations of the State obscenity statute, the charges being based upon exhibitions of the motion picture film "Deep Throat" at the Gay Paree Theatre in Atlanta, Georgia. After a jury trial, Petitioner was found guilty and sentenced to a two-year term of imprisonment and to fines in the amount of $2,000.00. The judgment of conviction was affirmed in the Georgia Court of Appeals and in the Georgia Supreme Court in an opinion and judgment for which review was sought in this Court by way of a Petition for Writ of Certiorari. Said Petition for Writ of Certiorari was denied by this Court on February 23, 1976. Mr. Justice Brennan dissented from the denial of the Petition for Writ of Certiorari in an opinion joined by Mr. Justice Stewart and Mr. Justice Marshall.

REASON FOR GRANTING THE PETITION

One of the questions presented in the Petition which was denied by this Court was:

> "Whether the motion picture film 'Deep Throat' can, as a matter of law, be held obscene or whether it constitutes speech protected by the First and Fourth Amendments to the United States Constitution?"

In light of the presentation of said questions in the Petition, the second reason stated for granting the Writ was:

> "The motion picture film 'Deep Throat' upon which petitioner's conviction rests is an artistic work of

> national acclaim which may not, as a matter of applicable constitutional law, be held obscene since it constitutes expression protected under the First and Fourteenth Amendments to the United States Constitution."

The Petition for Writ of Certiorari thus squarely presented for this Court the issue of the legal status of the motion picture film "Deep Throat" as protected or unprotected speech. The Court was called upon to perform its duty of independent Appellate review of the motion picture film in order to determine that question.

Precisely one week after the denial of certiorari in this case, this Court granted a petition for writ of certiorari in a case styled *Marks v. United States,* No. 75-708. Certiorari granted March 1, 1976.

The *Marks* case involves a conviction rendered in the United States District Court for the Eastern District of Kentucky for conspiracy to violate Federal obscenity laws through the interstate transportation of obscene motion picture films. Among the films so transported and alleged to be obscene in *Marks* is "Deep Throat," the film upon which Petitioner's conviction in this case rests.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court convictions in *Marks.* In so affirming, the Court of Appeals rejected, *inter alia,* appellants' argument that the motion picture films there involved were not, as a matter of constitutional law, obscene. Though rejecting the appellants' claim that said films, including the film "Deep Throat," were not obscene, the Court of Appeals

did not itself review the films. This failure to independently review the materials charged as obscene was one of the grounds raised in the Petition for Writ of Certiorari in *Marks*.

As a result of the granting of the Petition in *Marks*, this Court now has before it the question of whether an appellate court must itself view materials charged as obscene in making an independent determination of the issue of obscenity. In making this independent appellate review itself, the Court will be called upon in *Marks* to review the motion picture film "Deep Throat."

The presence of the above issue before this Court for plenary review in *Marks*, clearly constitutes an intervening circumstance of substantial and controlling affect on this case. The Petitioner herein, like the Petitioners in *Marks*, has placed the motion picture film "Deep Throat" before this Court for an independent appellate review of its alleged obscenity. Since the disposition of that issue in *Marks* so substantially affects a proper resolution of the same issue in the instant case, the Court may wish to defer action on this Petition for Rehearing pending a decision in *Marks*.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant a rehearing of the Order of Denial, vacate that Order, grant the Petition and review the Judgment and Opinion below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Counsel for Petitioner hereby certify that this Petition for Rehearing is presented in good faith and not for purposes of delay. Said Counsel further certify that said Petition is restricted to the grounds specified in Rule 58(2) of the rules of this Court.

Counsel for Petitioner.